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3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
5

6 JOHN L. SCHLABACH,

NO. CV-12-0618-JLQ

7 Plaintiff,

8 v.

9 UNITED STATES OF AMERICA,

**ORDER GRANTING MOTION TO
DISMISS; DIRECTING ENTRY OF
JUDGMENT AND CLOSING FILE**

10 Defendant.
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13 **BEFORE THE COURT** is the United States' Motion to Dismiss (ECF No. 9), to which
14 Plaintiff has filed a Response in opposition (ECF No. 14). For the reasons stated below, the
15 Motion to Dismiss must be granted.

16 **I. BACKGROUND**

17 On September 4, 2012, Plaintiff John J. Schlabach filed a *pro se* Complaint in the
18 Superior Court for Spokane County, Cause No. 12-2-03482-1 alleging "Trespass on the
19 Case" against a U.S. Tax Court clerk, Robert R. Di Trolio, a U.S. Tax Court Judge, L. Paige
20 Marvel, and an attorney for the Internal Revenue Service, Patsy Clarke. The Complaint
21 alleges that in the context of a proceeding he filed in the U.S. Tax Court, the Defendants
22 "exceeded their authority...by refusing to file documents, motions, orders and writs..." In
23 addition to damages and attorney's fees, the Complaint seeks 1) declaratory judgment
24 declaring "that defendants have abused their authority and have acted contrary to
25 constitutional right, power or privilege" and "that the records of the court not of record are
26 impeached for want of jurisdiction" and 2) injunctive relief enjoining the Defendants from
"refusing to file any documents, motions, orders or writs properly served upon the clerk and

1 opposing counsel” and enjoining the judge “from issuing any orders without leave of the
2 court.”

3 On December 10, 2012, the United States removed the matter from state court to this
4 court. On January 7, 2013, the court granted the United States’ Motion for Substitution as
5 the sole party Defendant pursuant to scope of employment certification of United States
6 Attorney Michael Ormsby and the provisions of the Federal Tort Claims Act (FTCA). (ECF
7 No. 7). Cognizant of the disadvantage that pro se litigants face, the court liberally construed
8 Plaintiff’s Complaint as a damages action sounding in the torts of trespass, negligence, and
9 misuse of authority. (ECF No. 7).

10 On February 22, 2013, the United States moved for dismissal of the Complaint for lack
11 of jurisdiction. Specifically, the Motion contends that (1) the United States has
12 not waived sovereign immunity to such suit; (2) subject matter jurisdiction is lacking since
13 Plaintiff failed to file an administrative tort claim with the required agencies prior to bringing
14 his lawsuit; (3) the three named federal employees have absolute immunity from suit;
15 (4) Plaintiff’s efforts to seek injunctive and declaratory relief in a tax matter is inappropriate;
16 and (5) Plaintiff has failed to effectuate proper service against the United States. (ECF No.
17 9). Plaintiff opposes the Motion contending sovereign immunity doesn’t apply because he
18 is the sovereign of the country and that the United States waived its immunity argument by
19 removing the case to federal court. Further he contends, neither the FTCA nor 26 U.S.C. §
20 7421(a) apply because he is not asserting tort claims, but rather a *Bivens* action.

21 **II. LEGAL STANDARDS**

22 Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(1) when the Court
23 lacks subject matter jurisdiction over the claim. Fed.R.Civ.P. 12(b)(1). This is a threshold
24 issue which goes to the power of the court to even hear the case. Because this basic
25 foundation is at stake, the court is not limited to the allegations in the Complaint but may also
26 consider extrinsic evidence and, if facts are in dispute, may weigh the evidence in order to

1 satisfy itself that jurisdiction exists. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.
2 1987). Although lack of subject matter jurisdiction is an affirmative defense, the burden of
3 proof to show jurisdiction in a 12(b)(1) motion is on the Plaintiff. *Stock West, Inc. v.*
4 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

5 A motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) tests the
6 legal sufficiency of the claims in the Complaint. A complaint must be dismissed if it does
7 not contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
8 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the
9 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
10 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The
11 Court must accept as true all material allegations in the complaint, as well as reasonable
12 inferences to be drawn from them, and must construe the complaint in the light most
13 favorable to the plaintiff. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir.
14 2004). In addition, where a plaintiff appears pro se, the court must construe the pleadings
15 liberally and afford the Plaintiff any benefit of the doubt. *Karim–Panahi v. Los Angeles*
16 *Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988). A pro se litigant is entitled to notice of the
17 deficiencies in the complaint and an opportunity to amend, unless the Complaint's
18 deficiencies cannot be cured by amendment. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th
19 Cir. 1987). Nevertheless, a pro se plaintiff's claims must be dismissed where it appears
20 beyond doubt that the Plaintiff can prove no set of facts in support of his claims that would
21 entitle him to relief. *Barrett v. Belleque*, 554 F3d 1060, 1061 (9th Cir. 2008).

22 **III. ANALYSIS**

23 **I. FTCA Claims against the United States**

24 The Defendant United States argues that the court lacks subject matter jurisdiction
25 because the United States has not waived sovereign immunity and because Plaintiff has not
26 shown he is entitled to bring suit under the FTCA. “The United States, as a sovereign entity,

1 is immune from suit unless it has consented to be sued. Waiver of immunity must be
2 demonstrated by the party suing the United States.” *Cominotto v. United States*, 802 F.2d
3 1127, 1129 (9th Cir. 1986). Plaintiffs must show that the government has “unequivocally
4 expressed” a waiver of immunity. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir.1985).

5 Plaintiff’s argument that sovereign immunity does not apply in this case because he “is
6 the true sovereign in this action...” is clearly without merit. While Plaintiff’s Complaint does
7 not reference the FTCA, the court liberally construed Plaintiff’s claims as asserting a tort
8 action for damages which would be governed by the FTCA. (*See* ECF No. 7). The FTCA
9 provides the exclusive means of recovering damages against the United States for certain
10 torts committed by federal employees within the scope of their employment. *U.S. v. Smith*,
11 499 U.S. 160, 163 (1991). However, under 28 U.S.C. § 2675(a) “a tort claimant may not
12 commence proceedings in court against the United States without first filing a claim with an
13 appropriate federal agency and either receiving a conclusive denial of the claim from the
14 agency or waiting for six months to elapse without a final disposition of the claim being
15 made.” *Jerves v. United States*, 966 F.2d 517, 519 (9th Cir.1992).

16 Here, Plaintiff does not allege that he has filed an administrative court claim either with
17 the U.S. Tax Court or Internal Revenue Service, and further the Government alleges that no
18 such claim was filed. Plaintiff essentially acknowledges he has not exhausted his
19 administrative remedies as he maintains the FTCA is inapplicable, and asks the court to
20 remand the case to state court. Given the failure to have exhausted his administrative
21 remedies, the court lacks subject matter jurisdiction over any tort claims under the FTCA.

22 Even if subject matter jurisdiction existed, the FTCA waives the Government’s sovereign
23 immunity only with respect to claims for injury “where the United States, if a private person,
24 would be liable to the claimant in accordance with the law of the place where the act or
25 omission occurred,” 28 U.S.C. § 1346(b)(1). Accordingly, the United States would be
26 entitled to assert any defense based upon judicial or quasi-judicial immunity which otherwise

1 would have been available to the individual federal employees. Here, the Complaint alleges
2 that in the context of a proceeding he filed in the U.S. Tax Court concerning his alleged
3 federal income tax liability, the Defendants "exceeded their authority...by refusing to file
4 documents, motions, orders and writs..." Plaintiff's claims reference federal employees'
5 judicial actions taken within the subject matter jurisdiction of the U.S. Tax court. Federal
6 judges are shielded from personal liability for their official acts so that they may "perform
7 their respective functions without harassment or intimidation." *Butz v. Economou*, 438 U.S.
8 478, 512 (1978); *Forrester v. White*, 484 U.S. 219, 225 (1988)(judges have absolute
9 immunity defense). In addition, this immunity doctrine has been extended to the conduct of
10 IRS advocates, *see Fry v. Melaragno*, 939 F.2d 832, 836 (9th Cir. 1991), and court clerks,
11 where the accused conduct is an integral part of the judicial process. *Mullis v. U.S.*
12 *Bankruptcy Court for Dist. of Nevada*, 828 F.2d 1385 (9th Cir. 1987)(court clerks have
13 absolute quasi-judicial immunity for refusal to accept a filing). These defenses likewise
14 immunize the United States from this action under the FTCA .

15 The remainder of Plaintiff's claims would fare no better under the FTCA even if judicial
16 immunity did not apply as the FTCA does not authorize this court to issue declaratory
17 judgments and injunctions against the United States. *See Estate of Trentadue v. United*
18 *States*, 397 F.3d 840, 863 (10th Cir. 2005)("[T]he District Court lack[s] subject matter
19 jurisdiction under the FTCA to provide injunctive and declaratory relief"); *see also* 28 U.S.C.
20 § 1346(b) (providing the district courts have jurisdiction over all civil actions on claims
21 against the United States, "for money damages, ... for injury or loss of property, or personal
22 injury or death").

23 **B. Denial of Leave to File Amended Complaint**

24 Although not pleaded in the Complaint, in his Response to the Motion to Dismiss
25 Plaintiff characterizes his claims as actionable under *Bivens v. Six Unknown Named Agents*
26 *of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* authorizes, in extremely

1 limited circumstances, damages suits against federal officials in their individual capacities
2 for violations of constitutional rights. However, the judicial immunity doctrines discussed
3 above would likewise apply to bar Plaintiff's constitutional tort claims against these federal
4 judicial employees, as well as any claim for declaratory, injunctive or other equitable relief
5 against these same employees. *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385,
6 1394 (9th Cir. 1987).

7 Although leave to amend is usually freely granted, in this instance Plaintiff's *Bivens* claim
8 against the tax court clerk and judge are such that the court must dismiss the Complaint
9 without leave to amend.

10 **IV. CONCLUSION**

11 For the foregoing reasons the court **GRANTS** Defendant's Motion to Dismiss (ECF No.
12 9) without leave to amend. The Clerk of the Court shall enter Judgment of Dismissal with
13 prejudice of the Complaint and the claims therein without costs or attorneys fees to any party.

14 The Clerk of this court shall enter this Order and judgment, forward copies to the Plaintiff
15 and counsel, and close this file.

16 **DATED** this 15th day of April, 2013.

17 s/ Justin L. Quackenbush
18 JUSTIN L. QUACKENBUSH
19 SENIOR UNITED STATES DISTRICT JUDGE
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